IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

TUESDAY, THE 31ST JULY 2007 / 9TH SRAVANA 1929

WP(C).No. 1937 of 2007(E)

AGAINST THE ORDER IN E.A. 212/04 IN E.P.56/03 O.S.349/96 OF THE MUNSIFF COURT, VARKALA.

PETITIONER:

PUSHPANGATHAN,
MADATHIVILA VEEDU, PLAVAZHIKOM, NEDUNGADA P.O.,
CHIRAYINKIL TALUK.

BY ADV. SRI.G.S.REGHUNATH

RESPONDENTS:
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1. BHANUDAS DALLY, PUTHEN VEEDU,
VILABHAGOM, NEDUNGANDA DESOM,
VETTOOR VILLAGE, CHIRAYINKIL TALUK.

2. RADHAMONY, MADATHIVILA VEEDU FROM
PLAVAZHIKOM VEEDU, VILABHAGOM, NEDUNGANDA DESOM,
VETTOOR VILLAGE.

R1 BY ADV. P.V. NEELAKANTA PILLIA.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 02/07/2007, THE COURT ON 31/07/2007 DELIVERED THE FOLLOWING:

APPENDIX

EXT. P1 **TRUE COPY OF THE PARTITION DEED DATED 23.8.54.**

EXT.P2 **TRUE COPY OF THE DECREE DTD.14.11.02 IN OS 349/96 ON THE FILE OF THE MUNSIFF COURT, VARKALA.**

EXT.P3 **TRUE COPY OF THE PLAN PREPARED BY THE COMMISSIONER.**

EXT.P4 **TRUE COPY OF THE PETITION E.A.212/04 IN EP 56/03 IN OS 349/96 FILED BEFORE THE MUNSIFF COURT, VARKALA.**

EXT.P5 **TRUE COPY OF THE ORDER DTD.4.10.06 IN EA 212/04 IN EP 56/03 IN OS 349/96 OF THE MUNSIFF COURT, VARKALA.**

[True copy]

P.A. to Judge.

M.N. KRISHNAN, J.

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W.P.C. NO. 1937 OF 2007

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Dated this the 31st day of July, 2007.

J U D G M E N T

This writ petition is filed seeking to set aside the order of the Munsiff, Varkala in E.A.212/04 in E.P.56/03 in O.S.349/96. The brief facts are as follows. The writ petitioner who is the 2nd defendant in the suit and the 2nd judgment debtor in the execution petition moved an application under Section 4 of the Partition Act and S.44 of the Transfer of Property Act to allow him to purchase the share allotted to the decree holder in the event of judgment debtors 1 and 3 not being allowed to purchase the decree holder's share. According to him the subject matter is the dwelling house of an undivided family and the decree holder who is only a stranger and purchaser of one of the shares is not entitled to get the property divided by metes and bounds in view of Section 4 of the Partition Act and the petitioner is entitled to purchase it under the provisions of law.

2. On the other hand the decree holder would contend in pursuance of the assignment she had been put into possession of a portion of the property and she is running a tea stall by constructing temporary shed and the house claimed by the petitioner is not a house belonging to the undivided family and therefore the petition is liable to be dismissed.

3. The execution Court did not accept the contention of the writ petitioner and rejected the claim. The decree holder contended that she is entitled to the property 'KLMJ' which is allotted to her as per the final decree.

S.4 of the Partition Act reads as follows.

> "Where a share of a dwelling house belonging to an undivided family has been transferred to a person who is not a member of joint family and such transferee sues for partition, the Court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it things fit and direct the

> sale of such share to such shareholder and may give all necessary and proper directions in that behalf". Or in other words, if it refers to cases where the share of a dwelling house belonging to an undivided family has been transferred."

In order to substantiate, the writ petitioner has to prove that the house belongs to an undivided family. It is also a settled preposition of law that the word 'undivided family' used in Section 4 is not one which is envisaged under the Hindu Law. Now, for an appreciation of the point involved, the devolution of property is to be discussed.

4. The decree schedule property was set apart to the mother Sarojini and her two daughters as per Ext.A1 partition deed of 1954. At that time, the writ petitioner was not even born. The property is six cents of land with trees and there was no building in it. Subsequently, in the year 1974, that is as per Ext.B3 settlement deed, a settlement was executed by the mother, two daughters, the writ petitioner and minor son of one of the daughters, Leela,

named Manju. Since, the decree schedule was adjacent to the place where Leela resided it was set apart to her and her son as B schedule to the 1974 document. Therefore, by Ext.B3 Leela and her son became the absolute owners of the property. Then, on 5.11.80 by Ext.B4 Leelamani and Manju transferred their right in favour of Sarala @ Radhamani. But, on 9.9.82 by virtue of a document No.3495/82 Radhamani assigned her right to her mother, Sarojini who in turn on the same day by virtue of Document No.3496/82 executes a gift deed in favour of Sarala @ Radhamani, Leelamani and Pushpangathan(writ petitioner). Then, by virtue of document No.3440/85 Leelamani surrenders her right to Radhamani whereby Radhamani gets 2/3rd right and Pushpangathan 1/3 right. Thereafter, as per Ext.B5 dated 20.12.86 the writ petitioner, Radhamani and Sarojini sold this property to one Hameed. He by Ext.B6 dated 2.11.87 assigned his right to Radhamani and thereby Radhamani becomes the absolute owner of the property. As per document No.3829/93 dated 16.10.93 Radhamani assigned 1/3 right to the writ petitioner

and as per document dated 1.3.95, i.e. Ext.B1, Radhamani assigned 1/3rd right to Dally, the plaintiff. It is for division and separation of 1/3rd right, Dally has instituted O.S.349/96. By virtue of Ext.B2 the said suit had been decreed and Dally is directed to be allotted 1/3rd share in the property. In pursuance of the same a final decree petition was filed, the property 'KMLJ' was set apart to the share of the plaintiff namely decree holder and she had applied for the delivery of the property. The writ petitioner moved a petition u/s 4 of the Partition Act.

5. Now, I may refer to the decisions cited before proceeding to discuss the matter on the basis of the dictum laid down in those decisions. The learned counsel for the writ petitioner cited before me the decision of this Court reported in ***Parvathy Amma v. Lakshmikutty Amma (1960 KLT 286)***. It was held in that case

> "The qualification of the applicant to make application under Section 4 must be judged with reference to his position at the time of his application. The alienation by him of his share

> previously does not disentitle him, if, as a matter of fact, he owns it at the time of his application. It may be that he owns it at the time by virtue of is repurchase."

In that case the facts would show that 11 members of an undivided family possessed a homestead. Some of the sharers transferred it and one of the sharers got a retransfer and petition was filed u/s 4 of the Act. But it was a case where indisputably the property belong to the undivided family.

6. The learned counsel then had relied upon the decision of the Apex Court reported in ***Hurmat Bibi v. Prodosh Kumar Bajpayee (1988 (Supp)SCC 507***). It was held therein that,

> "S.4 of the Partition Act does not create any bar for making a second application to buy the shares of a stranger purchaser provided at the time of making such application the property has not been divided by metes and bounds and the possession of the share of the stranger purchaser has not been delivered to him."

It was further held that,

> "S.4 was enacted having in mind the consideration of corporate property existing as a rule with special reference to joint property and social desire to preserve the unity of such property. It was also enacted with a view to maintain indivisibility and integrity of the property".

7. The other decisions referred to are ***Rajamma v. Ananthakrishnan Potti (1990(2) KLT SN page 42) and Krishnamoorthy v. Rasool (1991 (1) KLT SN 19)***. Those were cases where this Court took a view that injunction cannot be granted in favour of a stranger who comes into possession by purchase of an undivided share of a family house. The learned counsel had also placed before me the decision reported in ***Ghantesher Ghosh v. Madan Mohan Ghosh (2000 (10) SCC 85)***. Therein the right to purchase u/s 4 of the Partition Act continues till the termination of the proceedings. He has also relied upon the decision of the Patna High Court reported in **H.M. Mukharjee v. Shyam Sunder Kuer (AIR 1973 Patna**

142) wherein the Court held that the applications u/s 4 of the Partition Act can be made at any stage of the suit. The learned counsel had also pointed out the impact of S.44 of the Transfer of Property Act which disentitles a stranger purchaser from getting possession of the portion of the undivided house. So from the various decisions referred to above the following facts are clear namely,

(1) An application u/s 4 of the Partition Act can be filed before the culmination of the proceedings.

(2) Even if a shareholder assigns his right and repurchase if he gets a right at the time of the presentation of the petition, he can continue.

(3) Just because by some method the stranger has got possession of the property that will not disentitle the original sharer from preferring application. Before adverting to these matters the writ petitioner has to satisfy the conscience of the Court that there is dwelling house belonging to an undivided family. An undivided family means simply a family not divided qua, the dwelling house,

not otherwise, a family which owns a dwelling house and has not divided it. It does not mean Hindu Joint Family nor even joint family. The members need not be in the joint mess. The members of the family may have partition of their joint properties and may have separated it in mess and worship and there would still be an undivided family in relation to the dwelling house so long as they have not divided it among themselves. If in this state of things a member of the family transfers his share in the dwelling house to a stranger, the actual position is that it is still an undivided dwelling house. The possession and enjoyment of which are confined to the members of the family and the stranger transferee being debarred by law from exercising his right to joint possession which is one of the main incidence of co-ownership property.

8. From the materials available in this case even before the birth of the writ petitioner this property was set apart to the share of his mother and two sisters and there was no house in that property. Subsequently, by virtue of a settlement deed executed by the parties including the writ

petitioner it was set apart to one of the sisters Leela who had a house adjacent to this property. That was in the year 1974. At that point of time also there was no house in the property. This Leela subsequently assigned the same in favour of his sister Radhamani in the year 1980 and in 1980 also there was no dwelling house in the property. Thereafter, the said Sarala @ Radhamani who got the property in 1980, assigned it to her mother and the mother in turn executes a gift deed in favour of her three children on 9.9.82. Subsequently, one of the daughters again release her right to Sarala @ Radhamani. To crown all these cases in the year 1986 the members joined together and executed an assignment deed in favour of a stranger namely Hameed. Hameed in the year 1987 retransfers the property to Radhamani. Later by two assignment deeds 1/3 of his right is given to the writ petitioner and 1/3 right is given to the plaintiff in O.S.349/96. So, the concept of an undivided family was not there with respect to the building now situated in the decree schedule at all. When it was a joint

property there was no building and it was only house cite presumably which is constructed by one of the purchasers and may be one of the sharers and it shall not have the characteristic of an undivided family house at all. The property went on to the hands of strangers as well and then got it reconveyed. So by any stretch of imagination on facts one cannot hold that the property was an undivided family house at any point of time. When it is so it may not be possible to apply S.4 of the Partition Act even if the other ingredients are fulfilled. The learned counsel for the writ petitioner submits before me that by repurchase it becomes the house of an undivided family. Unless it was a family house belonging to the undivided family at any point of time, by repurchase it cannot have the characteristic of an undivided family house. Therefore, on facts I have absolutely no hesitation to hold that the writ petitioner is not entitled to get assignment of the property u/s 4 of the Partition Act. The other legal propositions argued by the learned counsel certainly would apply only if the house is

undivided family house as envisaged u/s 4 of the Partition Act. Therefore, I find no ground to interfere with the decision of the Court below and therefore this writ petition lacks merit and it is dismissed.

M.N. KRISHNAN, JUDGE.

ul/-